91-1427

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

JOSEPH R. KLINEBURGER,

Petitioner,

vs.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., Inc.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

AVRAM G. ADLER
MARC S. HENZEL
Counsel of Record
ADLER & KOPS
Attorneys for Petitioner
210 West Washington Square
Second Floor
Philadelphia, PA 19106
(215) 625-9999

THE COPY CENTER, INC. 615 Chestnut Street Philadelphia, PA 19106 215-928-1900

QUESTIONS PRESENTED FOR REVIEW

Whether specific physical contact is a requirement under the General Maritime Law and the Jones Act for recovery of a Captain of a barge carrying an ultra hazardous cargo of fuel and molten asphalt, and furnished an inadequate and shorthanded crew requiring the Captain, for the safety of the Barge to work extra watches and to suffer sleep deprivation over a period of months, resulting in an emotional disorder with physiological manifestations.

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH R. KLINEBURGER,
Petitioner

vs.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

OPINIONS BELOW

The Petitioner, Joseph R. Klineburger, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Superior Court of the Commonwealth of Pennsylvania entered in this proceeding on May 22, 1991. The Opinion of the Superior Court

of the Commonwealth of Pennsylvania is reported at 404 Pa.Super. 490 (1991), 591 A.2d 314, 1991 A.M.C. 2384, Appeal Denied 600 A.2d 954 (1991). The Opinion also appears in the Appendix hereto. The denial by the Supreme Court of the Commonwealth of Pennsylvania of the Petition for Allowance of Appeal of Joseph R. Klineburger was denied on December 11, 1991 without Opinion, 600 A.2d 954 (1991). The Opinion rendered by the Court of Common Pleas for Philadelphia County of the Commonwealth of Pennsylvania is not reported. The Opinion appears in the Appendix hereto.

JURISDICTION

The denial of the Petition for Allowance of Appeal of Joseph R. Klineburger by the Supreme Court of

Pennsylvania was denied on December 11, 1991. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

46 U.S.C. § 688 (Jones Act) provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the

death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Joseph R. Klineburger was an employee of the defendants and a member of the crew of the Tanker Barge 71 in the capacity of Captain. Barge 71 was owned and operated by Maritrans, Maritrans Operating Partners, L.P. and Maritrans G.P., Inc. On or about July 3, 1986 defendants hired and assigned to Tanker Barge 71 as a member of the crew, one Charles Edwards while the Tanker Barge was under tow. At the outset, Charles Edwards exhibited severe mental aberrations in which he spoke about killing people and about people he had killed. Edwards played with fire which was absolutely prohibited aboard this type of vessel. Edwards blew fire into the face of one of the crew members.

Edwards later disappeared over the side of the vessel while the voyage was underway en route to Providence, Rhode Island. In addition, Charles Edwards lacked the necessary papers to act as a tankerman, causing all watches to be borne by the plaintiff and one other tankerman.

The Barge contained two eight and a half million B.T.U. heaters which required constant surveillance. The heaters have a tendency to catch fire and, therefore, require constant surveillance. They also require huge inputs of electrical power with the risk of explosion and fire as a constant. The Barge is a single-skinned boat containing thirty thousand gallons of fuel. The

heaters sit on top of the oil and the crew quarters are on top of the heaters. There were no valves on deck that could prevent or stop the flow of fuel oil into the heaters should the heaters catch fire. Barge 71 also carried molten asphalt as a general cargo.

From the time Charles Edwards disappeared over the side, plaintiff protested the sending of a seaman who was not qualified, like Charles Edwards. The result was that Charles Edwards was never replaced and from that moment on, the vessel carried an inadequate and incomplete complement aboard the vessel.

Plaintiff repeatedly made requests for a replacement for Edwards which became more hysterical and anxiety-ridden until December 1986 when he could no

longer continue to function as a barge captain as a result of exhaustion and sleep deprivation and required hospitalization for his emotional and psychiatric breakdown. The severe disabling anxiety and depression had physiological manifestations resulting in high blood pressure and protracted sleeplessness, which disability has continued from December 1986 to this time.

On December 18, 1989, the defendants, MARITRANS, MARITRANS OPERATING PARTNERS, L.P. and MARITRANS G.P. INC., through their counsel, filed a Motion for Summary Judgment. The gravamen of the Motion for Summary Judgment is that a seaman is precluded as a matter of law from recovering from the

vessel owner for negligence and against the vessel for unseaworthiness if he has suffered merely emotional injury.

Answer to the Motion for Summary Judgment was filed with affidavits and the issue joined. (Appendix D) On April 10, 1990, the Honorable G. D. Cohen granted the defendants', MARITRANS, MARITRANS OPERATING PARTNERS, L.P. and MARITRANS G.P., INC., Motion for Summary Judgment. Appeal was timely taken to the Superior Court of the Commonwealth of Pennsylvania which is the Court of last resort as of right.

The Superior Court affirmed the trial court's holding that there could not be any recovery under General Principles of Admiralty Law or under the Jones Act, 46 U.S.C. §688, et seq. for

physical or emotional manifestations of work related stress. The Court of Common Pleas and the Superior Court determined, in accordance with Federal Maritime Law, that neither the Doctrine of Unseaworthiness under the General Maritime Law nor the Jones Act afforded a remedy for damages resulting from purely emotional injuries, even with physical manifestations.

At all points in the proceedings, both in the Court of Common Pleas and in the Superior Court, the federal question was conceded.

Following the Decision and Order of the Superior Court on May 22, 1991 plaintiff filed Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. The Petition for Allowance

of Appeal is a procedure that approximates a Petition for Certiorari in this Court. On December 11, 1991, the Petition for Allowance of Appeal was denied.

REASONS FOR GRANTING THE WRIT

I.

The decision below is contrary to the mandate of this Court as to emotional injury and is contrary to the holdings in the Ninth and Fifth Circuits of the Courts of Appeals.

The decision of the highest Appeal Court as of right in the Commonwealth of Pennsylvania is in conflict with the Court of Appeals for the Fifth and Ninth Circuits as demonstrated in Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991), Court En Banc argument ordered 2/11/92, ___ F.2d ___ 1992, WL 22975 (5th Cir. La.) and Taylor v. Burlington

Northern Railway Company, 787 F.2d 1309 (9th Cir. 1986). See also Buell v. Atchison T. & S.F.R. Co., 771 F.2d 1320 (1985); remanded Atchison, T. & S.F.R. Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed. 2d 563 (1987). In addition, the case sub judice constitutes a rejection of the mandate set forth by this Court in Atchison, T.& S.F.R. Co. v. Buell, supra. Rule 10 of the U. S. Supreme Court Rules sets forth the consideration governing Writ of Certiorari. A Petition for Writ of Certiorari will be granted only when there are special and important reasons therefor. Among the reasons that warrant this Court's consideration is when there has developed a conflict on a federal question between United States Courts of

Appeals and a State court of last resort, as in the case sub judice. In addition, we submit that Rule 10(c) of the Supreme Court Rules calls for this Court to exercise its discretion in granting a Writ of Certiorari when the Superior Court has ignored its mandates.

The Superior Court of Pennsylvania has decided an important question of federal law incorrectly and contrary to Atchison, T.& S.F.R. Co. v. Buell, supra. It is not alone in this regard. In addition, the First, Third, Fourth, Sixth and Seventh Circuits have failed to heed this Court's direction that an emotional injury lacking a physical trigger is nevertheless within the ambit of injury as set forth in the Federal Employers' Liability Act, §1 et seq., 45 U.S.C.A.

§51 et seq. (hereinafter referred to as "FELA") and the Jones Act.

In coming to the conclusion that purely emotional injuries, with or without physical manifestations deserve redress, the field of decisions were reviewed by the Fifth Circuit in Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir,. 1991), Court En Banc argument ordered 2/11/92, ___ F.2d ___ 1992, WL 22975 (5th Cir. La.)

In Plaisance v. Texaco, Inc., 937 F.2d 1004 (5th Cir. 1991) the case involved a tugboat captain and his wife seeking recovery for emotional injuries that resulted from witnessing a fire. Plaisance was a tugboat captain and was towing a workover barge from one well location to another in Louisiana coastal

waters. The barge's spuds projected below its bottom and came in contact with an under water four inch gas pipeline. The pipeline ruptured, the gas escaped, and an explosion and fire ensued. The tow was disconnected and the tug was taken a short distance off. The fire was confined to the rear of the barge and the front of the trailing tug. The fire was extinguished by the combined crews of the two tugs and the crews of other vessels which were attracted by the fire. The entire operation took less than thirty minutes. No one was injured by the explosion or the fire.

Several hours later, upon arriving at the repair dock, Plaisance asked to be relieved of duty because he did not feel well. He first went to a local hospital

for a few days and then transferred to a psychiatric hospital, where he remained for some forty-five days. According to the treating psychiatrist, Plaisance was suffering from post-traumatic stress, disorder and depression resulting from his perception that he and others could have been injured or killed. Plaisance sought recovery under the Jones Act for a purely emotional injury. A motion to dismiss was filed by Texaco and granted by the lower court. The Court of Appeals for the Fifth Circuit, hearing the case on appeal, took cognizance of the decision by this Court in Atchison, T. & S.F.R. Co. vs. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), which had considered the issue of recovery for purely emotional injuries. This Court,

because of the paucity of the record, declined to decide whether the FELA permitted recovery in Buell's case. It did, however, hold:

> [t]he question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA jurisprudence gleans guidance from common law developments, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity... In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in the area may have to bow to the precise application of developing legal principles to the particular facts at hand. (U.S. 568, S.Ct. 1417)

The Plaisance court took note that

the Supreme Court had left open the question, by suggesting that the Federal Courts consult the common law for guidance. The Plaisance court then went on to say:

> "[w]hat constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes." Urie v. Thompson, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949); see also Dice v. Akron, C.& Y.R. Co., 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

The Plaisance court viewed the comments by the Supreme Court in Buell as an open invitation to the Lower Federal Courts to explore the parameter of recovery under the FELA for a purely emotional injury, citing Moody v. Maine C.R. Company, 823 F.2d 693 (1st Cir. 1987). It also conducted a circuit

roundup and came to the conclusion that other than the Ninth Circuit, in Buell v. Atchison, T. & S.F.R. Co., 771 F.2d 1320 (9th Cir. 1985) and Taylor v. Burlington Northern Railway Company, 787 F.2d 1309 (9th Cir. 1986), the invitation had been declined in the First, Third, Fourth, Sixth and Seventh Circuits.

The Plaisance court took issue with their Circuit Court brethren in their reluctance to accept the invitation of this Court to establish the parameters of what constitutes an emotional injury and held that an emotional injury can be every bit as harmful, debilitating and destructive of the quality of one's life as a physical injury. They therefore held that a claim for emotional injury caused by emotional distress negligently

inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA. The Plaisance Court reviewed the four basic paradigms sometimes used: (1) a physical injury or impact; (2) a zone of danger; (3) being a bystander; and (4) recovery. (F.2d 1009) The Plaisance Court went on to say:

> The physical injury or impact rule permits recovery for emotional injury provided there is some physical contact. The ostensible justification for this requirement is that it affords a semblance of a guarantee that the mental injury is genuine. Restatement (Second) of Torts §436 A comment b (1965); W.Keeton, Prosser and Keeton on Torts, 363 (5th ed. 1984). It provides a bright line basis for recovery for an emotional injury. This rule has been criticized, however, as being arbitrarily underinclusive for there are genuine mental injuries that are not accompanied by a physical injury or impact. Buell, 480 U.S. at 569 n. 18, 107 S.Ct. at 1417 n.18 ("The American Law Institute urges that as

long as the distress is 'genuine and severe,' bodily harm should not be required."); Bell, The Bell Tolls: Toward Full Tort Recovery for Psychic Injury, 36 U.Fla.L.Rev. 333, 337 (1984) (hereinafter The Bell Tolls). (F.2d 1009)

As to the zone of danger doctrine, the Plaisance Court decried its limitation:

> While this rubric permits recovery in some instances excluded by the physical injury or impact rule, it nevertheless suffers from the same basic failing: it excludes recovery by persons suffering a genuine emotional injury. The arbitrary nature of this rule is best illustrated by the circumstance that the difference of a handful of inches may determine compensation for emotional distress. (F.2d 1009)

Plaisance, for good reasoning, also rejected the limiting aspect of the bystander rule.

As to the full recovery rule the Fifth Circuit stated:

> The full recovery rule permits a general negligence cause of action

> for the infliction of serious emotional distress. It requires that the mental injury be evaluated according to an objective standard. The plaintiff's claimed emotional injury must result from a situation in which a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances. See Prosser and Keeton on Torts 365 n. 60; see also Paugh v. Hanks, 6 Ohio St. 3d 72, 451 N.E.2d 759, 765 (1983). (F.2d 1010)

The Fifth Circuit in Plaisance also quoted Prosser and Keeton on Torts, page 361 that the shibboleths for barring mental injuries, are just that. The problem is one of adequate proof and a remedy should not be denied because some claims may be false. The Plaisance court summed up its review:

> "There need be little reminder of the mandated liberal interpretation to be ascribed to the FELA and Jones Act. Buell, 480 U.S. at 561-62, 107 S.Ct. at 1413-14; Gaston, 866 F.2d at 818. We conclude that a rule which allows recovery for true,

> significant mental injuries is best attuned to that mandate. Having so stated, we remain vitally aware that seamen and railroaders have chosen callings that "involve braving certain hazards [which] are traditionally not well suited to the squeamish or fainthearted." Gaston, 866 F.2d at 820. In evaluating claims of emotional injury, courts must attribute to those who choose these callings the appropriate daring and strength and quality of character."

The Plaisance court tested the actions of Plaisance against the principles they had just enunciated. A claim lacking validity could be winnowed out without a broad pronouncement capturing all other victims in its net. The Court found that Plaisance was not threatened by the fire; that fires in the oil field and the firing of gas are not unusual sights and that the treating psychiatrist testified that he was baffled by Plaisance's overall reaction.

The Court sharing that bafflement, affirmed the court below.

The principles that had been enunciated survived to be effective for valid and deserving cases. The Superior Court of the Commonwealth of Pennsylvania conducted no such searching analysis of a doctrine. It slavishly followed Kraus v. Consolidated Rail Corporation, 723 F.Supp. 1073 (E.D.Pa. 1989). Appeal Dismissed, 899 F.2d 1360; Holliday v. Consolidated Rail Corporation, 914 F.2d 421 (3rd Cir. 1990), and Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989). These cases invite scrutiny.

The Superior Court sub judice adopted the reasoning of Kraus:

> "plaintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or

> illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and, yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA." 723 F.Supp. at 1090 (footnote omitted).

The Superior Court summed up the Kraus decision by saying:

> "The court assigned as reason for its holding a fear of (1) fraud, (2) a flood of litigation by disenchanted workers, and (3) incalculable and potentially unlimited damages. It also opined that a contrary rule would create problems regarding causation and foreseeability. The court foresaw also that claims would be open to the defense of assuming the risk of stress related injuries by voluntarily accepting stressful positions. Such injuries, the court suggested, are caused by 'too much -- not too dangerous -- work."

591 A.2d 314, 317.

This reasoning is rebutted in Plaisance, supra. It would be folly to compare the actions of Klineburger charged with maintaining the safety of an explosive barge, shorthanded and sleep-deprived, with lawyers, doctors, bus drivers, police officers, laborers and even judges. While they may work hard, they do not face this condition every working day for months.

It is up to the litigation system to weed out the frauds and the excesses. A back condition or a whiplash is more easy to feign then the complexities of a nervous breakdown.

In Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989), reliance by the Superior Court is misplaced.

Seeking to use it as a general rule against a purely emotional injury is not followed in Plaisance, 937 F.2d 1004. Gaston merely refuses to follow or implant bystander liability. In Gaston, 866 F.2d 816 (5th Cir. 1989) the Fifth Circuit said it is not barring recovery under the Jones Act for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him. (emphasis supplied)

In the instant case, the unseaworthiness of the vessel, because of its undermanning and its inadequate crew, was a continuing breach of the warranty of seaworthiness that eroded the defenses against abuse. Klineburger was no tyro. He had been going to sea for many years.

He had survived temporary setbacks; he had seen a man killed; he had been involved in fires and he had bounced back. The prolongation and the constancy of the unseaworthiness of the vessel by first putting a dangerous crew member aboard and when he disappeared over the side, failing to replace him, in time caused Klineburger to be totally disabled with physiological manifestations. The fanciful reasons that were suggested in Kraus v. Consolidated Rail Corporation, 723 F.Supp, 1073 (E.D.Pa. 1989), Appeal Dismissed, 899 F.2d 1360, to bar emotional injury defy logic.

The Jones Act talks of injury as being compensable. Medicine has long accepted the concept that injury includes the disruption of an emotional well being

as it would a physical well being.

This Court recognized in Urie v. Thompson, 337 U.S. 163, 186, 69 S.Ct. 1018, 1033, 93 L.Ed. 2d 1282, that to be compensable under the FELA an injury need not be inflicted by external violent or accidental means. The Court in Urie v. Thompson, supra, held that continuous inhalation of silicon dust resulting in silicosis is compensable under the FELA when it results from the employer's negligence. A railroad in failing to furnish prompt medical attention to an employee who suffered a heart attack, has been found to be compensable. Randall v. Reading Company, 344 F.Supp. 879, 881-82 (MD Pa. 1972). See also McMillan v. Western Pacific Railroad Co., 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 Pac.2d 449

(1960).

Seaworthiness is a warranty of fitness for duty, a concept of the General Maritime Law. The doctrine imposes on a vessel owner or its operator an absolute and nondelegable duty to provide a vessel that is fit for its intended purpose for the voyage. See Mahnich v Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944); McAllister v Magnolia Petroleum Co., 357 U.S. 221, 78 S.Ct. 1201, 2 L.Ed. 2d 1272 (1958). It requires that the vessel is a place to work and although the sea is inherently dangerous, the vessel itself should be free from hazards.

While it is the usual state of affairs that a cause of action for unseaworthiness results from a defective

condition of the vessel, its equipment or appurtenances, it is also the Maritime Law that members of the crew of a vessel are also warranted as seaworthy, and there is liability for a crew member who is not equal to his calling on a vessel undermanned. Waldron v Moore-McCormack Lines, 386 U.S. 724, 87 S. Ct. 1410, 18 L. Ed 2d 482 (1967); Boudoin v Lykes Bros. S.S. Co., 348 U.S. 336, 75 S.Ct. 382, 99 L. Ed. 2d 354 (1955), judgment amended 350 U.S. 811, 76 S.Ct. 38, 100 L.Ed 727 (1955). See also Mesle v Kea S.S.Inc., 260 F.2d 747 (3rd Cir. 1963) which holds as a definition of unseaworthiness that a vessel owner, knowing that a certain activity is to take place, has the absolute duty of

furnishing such equipment and in this case, such sufficient and adequate personnel, as would enable that activity to be done in reasonable safety.

In the instant case Klineburger is not a bystander. He is a participant. The effects of the unseaworthiness of the vessel are directly visited upon him. He is the captain of the barge. He has the ultimate responsibility for multiple hazards, not only to himself but to the vessel, to others and to the environment. He is sitting upon gallons of fuel oil and molten asphalt in which maintenance and surveillance and attention are constant. Beginning in early July and culminating in December he was given a crew member who was clearly not equal to his calling and thereafter an

insufficient complement. These are fundamental definitions of unseaworthiness. Thereafter the vessel sails with a short complement, doubling the work and the watches of Klineburger a situation in which he is in involved in a hysterical scramble to perform the necessary duties to maintain any semblance of safety.

Textbooks have dealt long and well with combat neuroses. The experiences of seamen can and do frequently rival battle fears with a threat of death, plus intense fatigue which are the precipitating factors in the production of combat neuroses. Noyes and Kolb, Modern Clinical Psychiatry, at pg. 449. Combat neuroses is a combination of fear and anxiety. It has been said that fear

is an emotion experienced in response to a stimulus having actual reality, one that either constitutes a present threat to the individual or portends real danger. Anxiety, on the other hand, is an expectation of danger, an emotional state of apprehensiveness, uncertainty, and insecurity, that may be produced from situations symbolic of external danger. Noyes and Kolb, Modern Clinical Psychiatry, at pg. 450.

The conditions engendered from the long term unseaworthiness and the combination of fear and anxiety in a context of real danger produced a condition similar to a combat neurosis which was not only foreseeable, but was predictable.

CONCLUSION

For these reasons, it is prayed that a writ of certiorari should issue to review the judgment and opinion of the Superior Court of the Commonwealth of Pennsylvania.

Respectfully submitted,

AVRAM G. ADLER
Counsel of Record

ADLER & KOPS
Attorneys for Petitioner

APPENDIX A - OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY MOTION DIVISION - CIVIL ACTION DATED APRIL 10, 1990

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
MOTION DIVISION - CIVIL SECTION

JOSEPH R. KLINEBURGER	:	MAY TERM, 1989
v.	:	
MARITRANS, MARITRANS	:	
OPERATING PARTNERS,	:	
L.P., AND MARITRANS	:	
G.P., INC.	:	NO. 1067

ORDER

AND NOW, this 10th day of April, 1990, upon consideration of Defendants' Motion for Summary Judgment and Responses thereto, it is hereby ORDERED and DECREED that Summary Judgment in favor of Defendants Maritrans, Maritrans Operating Partners, L.P., and Maritrans G.P., Inc. and against Plaintiff Joseph R.

APPENDIX A

Klineburger is GRANTED.

BY THE COURT:
/s/ G.D. COHEN
G.D. COHEN, J.

APPENDIX A

COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
MOTION DIVISION - CIVIL SECTION

JOSEPH R. KLINEBURGER	:	MAY TERM, 1989
v.	:	
MARITRANS, MARITRANS	:	
OPERATING PARTNERS,	:	
L.P., AND MARITRANS	:	
G.P., INC.	:	NO. 1067

Cohen, J. April 10, 1990

MEMORANDUM OPINION AND ORDER

The issue before the Court is whether Defendant's Motion for Summary Judgment should be granted when Plaintiff seeks recovery for negligence of Defendant vessel owner and for unseaworthiness of Defendant's vessel, when Plaintiff alleges emotional damages without any physical impact.

After consideration of the case law cited by Plaintiff in this matter, the

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relevant facts of the case at hand, and the standard in Summary Judgment proceedings, the Court finds that Plaintiff does not have a claim against Defendant and, therefore, Defendant's Motion for Summary Judgment should be granted.

This case began on June 26, 1989 when Plaintiff filed a Complaint alleging that he suffered psychiatric injuries including chronic anxiety disorder and major depression while an employee/seaman of Maritrans on board the Maritrans' Barge Interstate 71. Plaintiff alleges that Defendants owned, operated, managed and controlled Barge 71 at all times relevant to this cause of action and that Plaintiff, employee, member of the crew

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and Captain of said vessel developed severe disabling anxiety and depression culminating in his being unable to work since December, 1986. Plaintiff alleges that Defendant ship owners were negligent and Barge 71 was unseaworthy in: furnishing a member of the crew who was homicidal and dangerous, not only to the crew but to himself; requiring Plaintiff to work with an inadequate and inappropriate crew; requiring Plaintiff to stand excessive watches as the result of the inadequate and inappropriate crew; and placing equipment aboard the vessel which required constant surveillance. Plaintiff also alleges that he did not receive prompt and adequate medical care which could haver prevented the insidious

course of his physical and psychiatric condition and that Defendants failed to exercise due care under the circumstances and exercised a hiring policy that permitted the hiring of a seaman dangerous to the crew of the vessel and to himself. Plaintiff alleges that his injuries were caused by the negligence of Defendant, and that solely as the result of Defendant's negligence, Plaintiff sustained severe psychiatric injuries. Plaintiff demands judgment against Defendants in excess of $25,000.00 with costs and interest.

On October 20, 1989, at Plaintiff's deposition, Plaintiff elaborated that his fellow seaman, Charles Edwards, was a maniac who could not be trusted on deck

and who eventually jumped overboard. (N/T 16, 28) Plaintiff described Defendant's actions as peculiar because he rambled about people who he had killed in Vietnam and played with his lighter repeatedly blowing flame into his mouth with his inhaler. (N/T 23, 28, 29) Plaintiff stated that on one occasion, Charles Edwards blew fire into the tugboat's AB's face. (N/T 23)

Subsequently, Defendant filed a Motion for Summary Judgment alleging that Plaintiff's Complaint contained only allegations that Plaintiff had suffered psychiatric or emotional injuries as a direct result of the presence of a fellow crew member who had been assigned to the barge. Defendant, therefore, argued that

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Plaintiff is precluded as a matter of law from recovering from a vessel owner for negligence of the vessel and for unseaworthiness. Defendant for this reason argued that Plaintiff's claim against Maritrans must be dismissed.

On January 17, 1990 Plaintiff filed a Response to Defendant's Motion for Summary Judgment. Plaintiff admits that on June 26 Plaintiff filed a Complaint and states that the Complaint speaks for itself. Plaintiff further alleged that Defendants knowingly placed a seaman not equal to his calling on Barge 71 causing Plaintiff to suffer chronic anxiety disorder and depression culminating in psychological symptoms including but not limited to high blood pressure that

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rendered Plaintiff an industrial non-descript. Plaintiff denies that he only encountered the defective seaman several times over the three-day period when the latter was on the vessel. Plaintiff similarly contends that the encounters were threatening or intimidating to Plaintiff, and that the presence of Edwards was a continuous and oppressive presence causing psychological damage. Plaintiff contends that he did not merely suffer emotional injury but that he suffered severe anxiety disorder and major depression with psychological manifestations and psychiatric injuries as a result of the negligence of the ship owner and the unseaworthiness of the vessel. Plaintiff accordingly denies

that he is precluded as a matter of law from recovering from vessel owner for negligence and against Defendant Barge for unseaworthiness. Plaintiff contends that he suffered psychiatric injuries including chronic anxiety disorder and major depression while an employee/seaman of Defendant on board the Maritrans' Barge Interstate 71.

Subsequent to the Court's receipt of the aforesaid pleadings, the Court held oral argument on the matter. As a result or Plaintiff's representations, Plaintiff was granted additional time in which to file any supporting case law.

While the Court patiently awaited Plaintiff's Supplemental Brief, Defendant filed a Supplemental Brief stating that

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federal "maritime" law applies to the substantive issues of the Motion, that even application of Pennsylvania law precludes recovery, and that Plaintiff was a bystander entitled to no recovery from Defendant.

The Court finds that federal admiralty law applies to the substantive issues before it, that Pennsylvania law applies to the procedural issues, that Plaintiff's Supplemental Brief on the substantive issues contained clearly distinguishable cases and that Defendant is thereby entitled to Summary Judgment.

According to Pennsylvania law,a Motion for Summary Judgment:

"...shall be rendered if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Rule 1035, Pennsylvania Rules of Civil Procedure. See also, McDonald v. Marriott Corporation, 564 A.2d 1296 (Pa.Super. 1989). "Additionally, the record must be examined in the light most favorable to the non-moving party, accepting as true all well-pleaded facts in their pleadings and giving that party the benefit of all reasonable inferences drawn therefrom." Id at 1298. Moreover, the court's function in summary judgment proceedings "is not to determine the

facts, but only to determine if a material issue of fact exists." Id at 1298.

The Court strictly adheres to the guiding Pennsylvania law regarding Summary Judgment and after applying such law to the facts in the case at hand, the Court feels compelled to grant Defendant's Motion. In regard to the substantive case law cited by the parties, the Court finds the cases cited by Plaintiff to be distinguishable from the facts before it, while the cases cited by Defendant are both relevant and compelling.

In particular, the Court finds that two of the cases cited by Defendant are persuasive and relevant to the issue and

facts in the case at hand. In Gaston v. Flowers Transportation, 866 F.2d 816 (5th Cir. 1989), the court denied recovery for mental anguish to a seaman allegedly resulting from the horror of watching his half-brother crushed to death between two vessels. That court's determination was made after it found that the plaintiff was a bystander. Similarly, Plaintiff Klineburger was a bystander who only witnessed the alleged dangerous actions of Charles Edwards on board Barge 71. (See Klineburger Deposition pp. 29-33, 36-37)

In addition, in Kraus, et al. v. Consolidated Rail Corporation, 723 F. Supp. 1073 (E.D. Pa. 1989), the court concluded that a plaintiff could not

recover for job-stress related emotional injuries unless the plaintiff stated a claim for intentional or negligent infliction of emotional distress. That court found that in order for a plaintiff to prevail in a claim for intentional infliction of emotional distress, a plaintiff would have to show "outrageous" conduct by a defendant, and for a plaintiff to prevail for the negligent infliction of emotional distress, that plaintiff must allege some kind of specific physical contact. Since Plaintiff Klineburger has done neither of the above, he does not have a claim against Defendant. (See Klineburger Deposition p. 44)

Conversely, upon consideration of

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Plaintiff's Response to Defendant's Motion for Summary Judgment, and Plaintiff's Supplemental Brief in support of their Answer, the Court found the cited case law to be distinguishable from the case at hand. In Haggerty v. L & L Marine Services, Inc., 788 F.2d 315 (5th Cir. 1986), the Plaintiff sought damages for pain and suffering and mental anguish in the form of cancerphobia, which according to Plaintiff, was the result of the unseaworthiness of the vessel. The Haggerty case is distinguishable from Plaintiff's position because plaintiff Haggerty was completely drenched with a chemical that was known to have a carcinogenic affect and, therefore, that plaintiff's resulting cancerphobia, or

fear of contacting cancer, could be measured objectively. Such is not the case for Plaintiff Klineburger whose psychiatric injuries remain unsubstantiated by a psychiatrist and unmeasurable because of Plaintiff's history of mental distress. (See Attending Physician Statement of Disability, Dr. Wolgomat; Supplementary Proof of Law, Application for Disability Benefits; ATtending Physician's Statement; Defendant's Memorandum in Support of Motion for Summary judgment p. 4 4, and Klineburger Deposition pp. 45, 56-58.)

The Court also finds distinguishable Salerno v. Pan American World Airways, Inc., 606 F.Supp. 656 (S.D.N.Y. 1985),

because plaintiff Salerno's emotional injury was substantiated by her miscarriage approximately 24 hours after her plane ride aboard defendant's aircraft. Whereas, Plaintiff Klineburger's condition was never substantiated by any impact. (See Klineburger Deposition pp. 36-37 wherein Plaintiff states that Edwards never personally threatened Plaintiff.)

For the above reasons, the Court grants Defendant's Motion for Summary Judgment against Plaintiff Klineburger and in favor of Defendants Maritrans, Maritrans Operating Partners L.P. and Maritrans G.P., Incorporation.

BY THE COURT:
/s/ G.D. COHEN
G.D. COHEN

APPENDIX B - OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA

SUPERIOR COURT OF PENNSYLVANIA

NO. 1389 PHILADELPHIA, 1990

JOSEPH R. KLINEBURGER,
Appellant

vs.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., INC.

Appeal from Order of the Court of Common Pleas, Civil Division, of Philadelphia County, No. 1067 May Term, 1989.

BEFORE: WIEAND, KELLY and CERCONE, JJ.

OPINION BY WIEAND, J.: FILED MAY 22, 1991

The issue in this appeal is whether a ship's captain can recover under general principles of admiralty law or under the Jones Act, 46 U.S.C. §688, for physical or emotional manifestations of work related stress. The trial court held that there could be no such recovery

and entered summary judgment in favor of the defendant ship owner. After careful review, we affirm.

In July, 1986, Joseph R. Klineburger, an employee of Maritrans with sixteen years experience, was serving as captain of TAnker Barge 71, which had been engaged to transport a cargo of molten asphalt from Philadelphia to Providence, Rhode Island. Charles Edwards, who had recently been hired by Maritrans, was assigned to the vessel as a member of the crew. Klineburger has alleged that Edwards, from the beginning, displayed dangerous, aberrant behavior while aboard ship. Thus, he allegedly (1) bragged about his ability to kill and about having killed while serving in

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Vietnam; (2) played with fire by blowing flame at another seaman aboard ship after the ship had been loaded with fuel and cargo; and, finally, (3) jumped overboard and swam ashore while the ship was en route to Rhode Island. Between July 1986 and December, 1986, Edwards was not replaced; and, therefore, Klineburger and other members of the crew were required to stand more frequent watches. Klineburger contended that because of these events he suffered a chronic and debilitating anxiety and, because of the emotional/psychiatric injury which he sustained, became disabled from further employment. His condition was diagnosed by his physician, on the application for long term disability benefits, as

depression and anxiety, together with an incidentally discovered hypertension. Appellant, in depositions, said that he had suffered "emotional strain and stress." He attributed it to stress caused by Edwards' brief stay aboard ship. His physicians, on the other hand, attributed his condition to "no specific incident" but to life threatening experiences as a ship's captain.

In reviewing the grant of summary judgment, we are guided by the law set forth in Austin J. Richards, Inc. v. McClafferty, 371 Pa.Super. 269, 538 A.2d 11 (1988), allocatur denied, 520 Pa. 570, 549 A.2d 131 (1988), as follows:

> A motion for summary judgment may properly be granted only "if the pleadings,

interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b). See also: Williams v. Pilgrim Life Insurance Co., 306 Pa.Super. 170, 172, 452 A.2d 269, 270 (1982). In passing upon a motion for summary judgment, the court must examine the record in the light most favorable to the nonmoving party. Pocono international Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 82-83, 468 A.2d 468, 470 (1983); Zimmerman v. Zimmerman, 322 Pa.Super. 121, 124-125, 469 A.2d 212, 213 (1983); Wilk v. Haus, 313 Pa. Super. 479, 482, 460 A.2d 288, 289-290 (1983). It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Wilk v. Haus, supra, 313 Pa. Superior Ct. at 482, 460 A.2d at 290; Tom Morello Construction Co. v. Bridgeport Federal Savings & Loan Association, 280 Pa.Super.

> 329, 334, 421 A.2d 747, 750 (1980). Any doubt must be resolved against the moving party. Chorba v. Davlisa Enterprises, Inc., 303 Pa.Super. 497, 500, 450 A.2d 36, 38 (1982); First Pennsylvania Bank, N.A. v. Triester, 251 Pa.Super. 372, 378, 380 A.2d 826, 829 (1977).

Id. at 273-274, 538 A.2d at 13, quoting Thorsen v. Iron and Glass Bank, 328 Pa.Super. 135, 140-141, 476 A.2d 928, 930-931 (1984).

In the instant case, the injuries alleged by appellant occurred because of maritime activity occurring in navigable waters. Although the present action has been brought in a state court, liability must be determined according to federal, maritime law. 70 Am.Jur. 2d Shipping §447 (1987), citing Kermarec v. Compagnie

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Generale Transatlantique, 358 U.S. 625, 628, 79 S.Ct. 406, 408, 3 L.Ed. 2d 550, 553 (1959), overruled on other grounds, Maragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970); Sistrunk v. Circle Bar Drilling Co., 770 F.2d 455, 458 n.3 (5th Cir. 1985), cert. denied, 475 U.S. 1019, 106 S.Ct. 1205, 89 L.Ed. 2d 318 (1986).

Under federal law, a ship owner is strictly liable for failing to furnish a seaworthy ship. Liability for failing to provide a seaworthy ship arises independent of any duty to exercise reasonable care. See: Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95, 66 S.Ct. 872, 877-878, 90 L.Ed. 1099, 1106 (1946); Mahnick v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944). See also: Miles, Admx. v. Apex Marine Corp., 498 U.S. ___, ___, 111 S.Ct. 317, 322, 112 L.Ed. 2d 275, 286, 59 U.S.L.W. 4001, 4003 (1990). Appellant

contends that the ship owner's employment of Edwards and subsequent failure to replace him rendered the barge unseaworthy,. Under this doctrine, however, recovery by a seaman generally is limited to, "past and prospective loss of earnings, medical expenses, physical injuries and pain and suffering." Kiffe v. Neches-Gulf Marine, Inc., 709 F.Supp. 743, 745 (E.D. Tex. 1989), citing Sosa v. M/V Lago Isabal, 736 F.2d 1028, 1034 (5th Cir. 1984). See also: Gaston v. Flowers Transportation, 866 F.2d 816, 821 (5th Cir. 1989); Bartholomew v. Universel Tankships, Inc., 279 F.2d 911, 916 (2d Cir. 1960). Recovery for purely mental/emotional injury because of an unseaworthy vessel has generally been denied.

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The Jones Act makes available to seamen injured in the course of their employment a right of recovery for injuries resulting from the ship owner's negligence.[1] The Act "establishes a

---

[1] The Jones Act provides, in relevant part, as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C. §688(a)(1986).

FELA provides, in relevant part, as follows:

Every common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or

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uniform system of tort law parallel to that available to employees of interstate railway carriers under [the Federal Employers Liability Act (FELA), 45 U.S.C. § 51]." See: Miles, Admx. v. Apex Marine Corp., supra at ___, 111 S.Ct. at 321, 112 L.Ed. 2d at 285, 59 U.S.L.W. at 4004. See also: Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 546-547, 80 S.Ct. 926, 931, 4 L.Ed. 2d 941, 946 (1960); Neal v. Saga Shipping Co., 407 F.Ed 481, 485 (5th Cir. 1969), cert. denied, 395 U.S. 986, 89 S.Ct. 2143, 23 L.Ed. 2d 775

(footnote cont'd)
insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(1969). The Jones Act allows an injured seaman to recover for injuries on a theory of negligence which is different from and in addition to the strict liability theory established under the ancient doctrine of unseaworthiness. See: Garrett v. Moore-McCormack Co., 317 U.S. 239, 240 n.2, 63 S.Ct. 246, 148 n.2, 87 L.Ed. 239, 241 n.2 (1942); Rowley v. Sierra S.S. Co., 48 F.Supp. 193, 195 (N.D. Ohio 1942). Here, appellant alleges that his injury was caused by the ship owner's negligence in hiring Edwards, an averred dangerous person.

In Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed. 2d 563 (1987), the Supreme Court declined to decide whether

damages were recoverable for purely emotional injuries under the FELA, and therefore under the Jones Act. This caused the Court of Appeals for the Fifth Circuit, in Gaston v. Flowers Transportation, supra, to comment:

> The most recent statement from the Supreme Court regarding recovery for purely emotional injuries under the FELA, and therefore the Jones Act, is to be found in Atchison, Topeka and Santa Fe Railway Co. v. Buell, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed. 2d 563 (1987). In Buell, the Court declined to decide whether damage were recoverable for purely emotional injuries under the FELA because the record was not fully developed on the alleged tort of the employer and the claimed resulting injury to the respondence. Id. at 567, 107 S.Ct. at 1417. The court did, however, offer the following observation:
>
> In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise

application of developing legal principles to the particular facts at hand.

Id. at 570, 107 S.Ct. at 1418. This statement has been viewed as an open invitation "to parse the FELA in light of the specific facts" of a case. Netto v. Amtrak, 863 F.2d 1210, 1213 (5th Cir. 1989). Indeed, a liberal interpretation has traditionally been ascribed to the legislation; and the common law has served as a guide to interpreting the statute. See Buell, 480 U.S. at 568, 107 S.Ct. at 1417.

Id at 818.

Recovery for job related stress has been before the Court of Appeals for the Third Circuit and the United States Court for the Eastern District of Pennsylvania. In Kraus v. Consolidated Rail Corp., 723 F.Supp. 1073 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990-), the Court concluded that

> plaintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA. Lawyers, doctors, bus drivers, police officers, laborers, and, yes, even judges, face stressful conditions every working day. To suggest that Congress intended to single out railroad workers (and seamen under the Jones Act) as worthy of special protection from such stress would be pure folly. Job-related stress is simply not the type of problem intended to be dealt with by the FELA.

Id. at 1090 (footnote omitted). THe court assigned as reason for its holding a fear of (1) fraud, (2) a flood of litigation by disenchanted workers, and (3) incalculable and potentially unlimited damages. It also opined that a contrary rule would crate problems regarding causation and foreseeability. The court foresaw also that claims would be open to the defense of assuming the

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risk of stress related injuries by voluntarily accepting stressful positions. Such injuries, the court suggested, are caused by "too much -- not too dangerous -- work."

The reasoning in Kruass was approved by the Court of Appeals for the Third Circuit in Holliday v. Consolidated Rail Corporation, 914 F.2d 421 (3d Cir. 1990). Holliday, a railroad employee, was adversely affected by the stress of his job and began to experience heart palpitations, sleep disorder, anxiety, depression, tenesmus, a spastic colon and involuntary rectal discharge. The district court entered summary judgment in favor of the employer holding that psychological and physical manifestations

of job related stress were not recoverable under the FELA. On appeal, the Court of Appeals affirmed. In so doing, the Court observed that there had been no accident, and that Holliday had not observed injury to another party because of tortious conduct. The court also observed that Holliday's condition was not solely emotional but included physical consequences attributable to his emotional state. The Court declined to alter its analysis, however, observing that to hold otherwise would permit the most attenuated claims to be presented to a jury whenever a claimant alleged "possible negligence with psychological consequences." See also and compare: Gaston v Flowers Transportation, supra,

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where the Court of Appeals for the Fifth Circuit held that there could be no recovery for emotional distress after a seaman had observed a shipping accident in which his half-brother had been injured but which had not involved a physical touching of the seaman.

In the instant case, there is no contention that the ship owner was guilty of outrageous conduct suggesting an intentional infliction of emotional distress. Instead, appellant has alleged that he was injured when he performed normal duties as ship captain under conditions which were more difficult and stressful than usual because of Edwards. However, there was no threatening activity of any kind

directed at or near appellant personally, and he was not a witness to serious physical injury to any third person. Under these circumstances we conclude, as did the federal district court under similar facts in Kraus v. Consolidated Rail Corp., supra, and the Court of Appeals in Holliday v. Consolidated Rail Corporation, supra, that there can be no recovery under the Jones Act for the psychological and physical manifestations of job related stress alleged by the plaintiff-appellant.

These decisions specifically involved the Jones Act and FELA. We conclude, however, that they have equal application to claims based on the alleged unseaworthiness of a vessel. They

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represent policy statements pertaining to federal admiralty law and the nature of the claims which can be made thereunder. The trial court's entry of summary judgment in favor of the ship owner was consistent with these decisions and requires that we affirm its determination.

Judgment affirmed.

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IN THE SUPERIOR COURT
OF PENNSYLVANIA

No. 1389 Philadelphia, 1990

JOSEPH R. KLINEBURGER,
Appellant

vs.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., INC.,
Appellees

JUDGMENT

ON CONSIDERATION WHEREOF, it is now ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:
David A. Szewczak
Prothonotary

Dated: May 22, 1991

APPENDIX C - ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED DECEMBER 11, 1991

JOSEPH R. KLINEBURGER, PETITIONER v. MARITRANS OPERATING PARTNERS, L.P. and MARITRANS G.P., INC.

NO. 569 E.D. Allocatur Docket 1991

December 11, 1991

Petition Denied.

Per Curiam.

APPENDIX D - AFFIDAVIT OF PETITIONER FILED IN ANSWER TO MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

AFFIDAVIT

JOSEPH R. KLINEBURGER, being duly sworn according to law, deposes and states that he was employed as a Barge Captain by MARITRANS OPERATING PARTNERS and MARITRANS G.P., INC. and under whatever name and corporate style suited them at the time. His severe disabling anxiety and depression, which resulted in his being unable to work since December of 1986 and which has rendered him totally disabled, had at its start the placing aboard the barge Interstate 71 one Charles Edwards. Prior to this time,

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he had been able to cope with all of the hazards at sea which included ship collisions and fires which are doubly serious when one is concerned with traffic and petroleum products and in which fire is frequently a preamble to explosion. It was negligent on the part of the management of Barge 71 to put a seaman like Charles Edwards aboard that barge. He lacked tankerman's papers which meant that the ship's complement was not complete and required deponent and Robert Deane, the second tankermen, to double up and do the watches that would ordinarily be assigned to Charles Edwards. In addition, Charles Edwards exhibited severe mental aberrations in which he spoke continuously of killing

people and people that he had killed. This meant that he had to be watched and was a matter of constant concern. In addition, he played with fire which is absolutely prohibited aboard a vessel and on one occasion, blew fire into the face of one of the crew members. His disappearing over the side of the ship was the final culmination of anxiety creating acts by this member of the crew. The Barge contained two eight and a half million B.T.U. heaters which required constant surveillance. These heaters have a tendency to catch fire and they are a constant source of concern requiring constant surveillance; they require huge inputs of electrical power which rendered the prospects for an

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explosion and fire to be a constant worry. The Barge is a single skin boat containing thirty thousand gallons of fuel oil. The heaters sit on top of the oil and the crew quarters are on top of the heaters. There was no valves on deck that could prevent or stop the flow of fuel oil into the heaters should the heaters catch fire, which made the Barge a literal time bomb. When deponent protested the sending of a seaman like Charles Edwards aboard the vessel, the result was that he was never replaced and the vessel thereby was unseaworthy by reason of having an inadequate and incomplete complement aboard the vessel. Barge 71 carried molten asphalt as a general cargo.

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Plaintiff, from the time that Mr. Edwards disappeared over the side, continually pressed the defendants for the additional experienced crew member necessary. Plaintiff's request became more hysterical and anxiety-ridden until in December, 1986 he could no longer continue to function as a barge captain.

The placing of Charles Edwards aboard the barge which in the light of his inexperience and his homicidal and dangerous characteristics, demonstrated negligence on the part of the vessel owner, the presence of Charles Edwards on the vessel rendered the vessel unseaworthy. The total impact of a Charles Edwards with his life threatening attitudes and constant pre-occupation

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with fire, effected the deponent so severely that he began to develop severe disabling anxiety and depression which added his physical manifestations and high blood pressure, sleeplessness from which he has not to this day recovered. The anxiety created by Charles Edwards was of such a nature that both deponent and the second tankerman exhorted the defendants not to make public to anyone their addresses.

/s/JOSEPH KLINEBURGER
JOSEPH KLINEBURGER

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 16th DAY
OF JANUARY, 1990.

_____
NOTARY PUBLIC

(2)

No. 91-1427

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH R. KLINEBURGER,

Petitioner,

v.

MARITRANS, MARITRANS OPERATING PARTNERS L.P. and MARITRANS G.P., Inc.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF MARITRANS OPERATING PARTNERS L.P. AND MARITRANS G.P., INC. IN OPPOSITION

STUART M. GOLDSTEIN
Counsel of Record for Respondents
CLARK, LADNER, FORTENBAUGH & YOUNG
Attorneys for Respondents
One Commerce Square
2005 Market Street
Philadelphia, PA 19103
(215) 241-1885

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

COUNTER-QUESTION PRESENTED FOR REVIEW

Whether the plaintiff, a seaman, is precluded as a matter of federal law from recovering from a vessel owner solely for emotional injuries allegedly sustained as a result of a two-day experience with a fellow crewman who exhibited eccentric behavior?

PARTIES

Plaintiff, Joseph Klineburger, petitioner herein, was a seaman employed as a barge captain on the petroleum carrying barge INTERSTATE 71.

Respondents are Maritrans Operating Partners L.P. and Maritrans G.P. Inc.[1] (hereinafter collectively referred to as "Maritrans"), the owners/operators of the barge INTERSTATE 71. There is no formal legal entity known simply as "Maritrans," as listed in the caption.

1. Maritrans Operating Partners L.P. is an operating limited partnership. Maritrans G.P. Inc. is the managing general partner of Maritrans Operating Partners L.P. and is not a parent or subsidiary corporation.

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OPINIONS BELOW

Respondents acknowledge and accept the listing of the Opinions Below presented by plaintiff at pages 1-2 of his petition.

JURISDICTION

Respondents acknowledge and accept the Statement of Jurisdiction presented by plaintiff at pages 2-3 of his petition.

STATUTORY PROVISIONS INVOLVED

Respondents acknowledge and accept the statement of the Statutory Provisions Involved presented by plaintiff at pages 3-4 of his petition.

CONCISE COUNTER-STATEMENT OF THE CASE

Maritrans is the owner and operator of the petroleum carrying barge INTERSTATE 71. The barge was designed to transport crude oil and petroleum derived products through navigable waters.[2] The vessel and its equipment were seaworthy in all respects and were safely operated.[3]

Plaintiff was the barge captain of the INTERSTATE 71 during the relevant times at issue. On or about June 26, 1989, plaintiff instituted suit against Maritrans under the Jones Act, 46 U.S.C. §688 *et. seq.*, and the

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2. Plaintiff's references in his petition to the barge carrying "ultra-hazardous cargo" is misleading, since it is both factually and legally inaccurate. There is nothing in the factual record of this matter which states or even suggests that the cargo carried by the barge was "ultra-hazardous." Moreover, Maritrans knows of no court which has held that the carrying of petroleum products by barge, tanker vessel, or other means constitutes an "ultra-hazardous" activity.

3. Again, plaintiff has taken improper liberties with the facts. There is nothing in the record of the case which indicates that the barge heaters "required constant surveillance" or "have a tendency to catch fire," as stated by plaintiff on page 6 of his petition.

general maritime law for unseaworthiness, alleging in his complaint that, in July of 1986, he suffered "severe disabling anxiety and depression" as a result of a brief encounter with a fellow seaman, Charles Edwards, on the barge. Edwards had reported to the barge as a tankerman and, several days later, for unknown reasons, jumped overboard and swam ashore.

Plaintiff had sailed on Maritrans' barges from 1970 to December, 1986. During the sixteen year period he sailed with Maritrans, plaintiff experienced numerous calamitous events (e.g. the death and injuries of several seamen, fires, explosions, collisions) and came into contact with numerous "peculiar" people. He claimed that these experiences affected him emotionally. In fact, plaintiff ultimately applied for Social Security benefits, alleging psychiatric disability based on job related stress brought on by his cumulative sea going experience.

Despite these experiences, which he admitted affected his psychological state of mind, plaintiff, in the present suit, alleged that the emotional injuries forming the basis for all his claimed damages were related to his two day experience with Edwards. Plaintiff pleaded that this experience caused him "emotional strain and stress, emotional instability."

The primary event involving Edwards which allegedly bothered plaintiff, occurred just prior to Edwards' unexpected departure from the vessel. Plaintiff, Edwards, and several other crewman, including A.B. Steven Gardner, were in the galley of the barge having a conversation. At one point, Edwards brought out an antihistamine inhaler, took some of the antihistamine in his mouth, put a lighter near to his face, and blew a flame at Gardner. The flame did not injure anyone, although Gardner had to be restrained from attacking Edwards. Plaintiff told Edwards to straighten up. Edwards reacted passively, sat quietly, and pouted. Plaintiff was concerned about the incident, but confirmed that he was not intimidated by or scared of Edwards. Plaintiff stated that Edwards never threatened him or anyone

else, as far as he knew. Plaintiff never saw Edwards touch anybody.

The "fire" incident caused plaintiff to be concerned for the safety of the barge. Plaintiff claimed that it put a great deal of stress on him, caused him and the other tankerman to do extra work, and caused plaintiff to lose one night's sleep.

Aside from normal vacations, plaintiff never missed a trip on the barge from July, 1986, the time of the Edwards' incident, to December, 1986, when he ultimately got off the boat. During these six months, plaintiff never told anyone at Maritrans that Edwards had affected him. Plaintiff testified that he never told anybody, other than his counsel, about Edwards.[4]

Following plaintiff's departure from the barge, plaintiff was treated by a psychologist and a physician. The reports of these treating specialists do not attribute plaintiff's emotional problems to any one specific incident. The reports relate plaintiff's condition to a "variety of injury and life threatening experiences" caused by "close calls at sea, accident, injuries, explosions, fire, and death." No medical records discussed or even referenced an incident involving Edwards or a seaman in July, 1986.

Maritrans filed its motion for summary judgment with the trial court on December 18, 1989. The basis for the motion was that, even assuming that the Maritrans' vessel was unseaworthy as a result of the presence of Edwards – which the lower court was required to do in considering the motion – plaintiff's suit must be dismissed since his damages consisted only of emotional claims of injury. The motion contended that recovery for

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4. On page 7 of his petition, plaintiff erroneously states, as fact, that when Edwards departed, the vessel "carried an inadequate and incomplete" crew. No independent evidence has ever been offered nor has a ruling been made that the crew's complement was inadequate.

non-physical impact injury, solely emotional in nature, is precluded as a matter of federal admiralty law.

The trial court, relying on this established precedent, granted the motion. The Pennsylvania Superior Court, citing the same precedent and rationale, affirmed the lower court's ruling. The Pennsylvania Supreme Court deemed it inappropriate or unnecessary to consider the question and denied plaintiff's petition for Allowance of Appeal, thereby leaving in place the ruling of the Superior Court.

SUMMARY OF THE ARGUMENT

Plaintiff is a seaman who claims to have sustained solely emotional damage while onboard a vessel plowing navigable waters. He alleges that as a crewman on the vessel, he witnessed several peculiar incidents involving a fellow seaman over a two day period; and, although he was not threatened, frightened, or intimidated by the actions of this seaman, plaintiff claims to have been emotionally affected by the incidents. However, since plaintiff sustained purely emotional injury, he is precluded from recovering any damages from the vessel owner as a matter of federal admiralty law. The courts below correctly applied this federal law and a further review of their rulings is unnecessary.

Most significantly, there are no special and important reasons for this Court to consider this matter. The overwhelming precedent, backed by common law, acknowledges that there may be no recovery for a seaman who sustains solely psychological injury. The precedent and the decisions of the lower courts, including the Pennsylvania Superior Court, are consistent and do not conflict with this Court's prior interpretation of the controlling federal law on this question.

ARGUMENT

(1) Certiorari is not warranted since the rulings of the state appellate courts below are not in conflict with a decision of this Court nor of the vast majority of the courts that have addressed the question.

In *Atchison, Topeka, and Santa Fe Railway Co. v. Buell,* 480 U.S. 557 (1987), this Court reserved ruling on whether a railroad worker could maintain a suit for purely psychological damage under the Federal Employers Liability Act, 45 U.S.C. §51, *et. seq.* (hereinafter the "FELA"). Of course, cases decided under the FELA are precedent in seamen's cases, since the FELA was used as the basis for the Jones Act which incorporates its provisions. *Miles v. Apex Marine Corp.,* 498 U.S. ____, 111 S. Ct. 1410, 112 L. Ed. 2d 275 (1990); *Ferguson v. Moore McCormick Lines,* 352 U.S. 521 (1957).

Buell specifically left open the issue of emotional damage, allowing each situation to be decided by the individual courts, based on the unique facts of each case:

> . . . the question whether one can recover for emotional injury may not be susceptible to an all inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand. 480 U.S. at 570.

Seizing upon this instruction, the vast majority of courts which have considered the issue of the recoverability of damages for purely emotional injuries in Jones Act/FELA cases under the *Buell* guidelines, have either denied recovery or have suggested their intention to do so. See for example, *Holliday v. Consolidated Rail Corp.,* 914 F.2d 421 (3d Cir. 1990), *cert. denied,* ____ U.S. ____ , 111 S. Ct. 970, 112 L. Ed. 2d 1057 (1991); *Gaston v. Flowers Transp.,* 866 F.2d 816 (5th Cir. 1989);

Hammond v. Terminal Rail Ass'n., 848 F.2d 95 (7th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989); *Moody v. Main Central R.R. Co.*, 823 F. 2d 693 (1st Cir. 1987); *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir. 1987) *cert. denied*, 484 U.S. 963 (1987); *Gottshall v. Consolidated Rail Corp.*, 773 F. Supp. 778 (E.D. Pa 1991); *Kraus v. Consolidated Rail Corp.*, 723 F. Supp. 1073 (E.D. Pa. 1989), appeal dismissed, 899 F.2d 1360 (3d Cir. 1990). These rulings have not been decided in a way which appears to conflict with the intent of the Court in *Buell* in 1987 or in today's legal environment. In this regard, reference is made to *Ray v. Consolidated Rail Corp.*,____ U.S. ____, 112 S.Ct. 914, 116 L. Ed. 2d 813 (1992) and *Carroll v. Consolidated Rail Corp.*, U.S. ____, 112 S. Ct. 916, 116 L. Ed. 2d 816 (1992) in which this Court, only two and a half months ago, denied petitions for writs of certiorari from the Seventh and Third Circuit Courts of Appeals, which courts had dismissed claims for purely emotional damage under the FELA.

The Pennsylvania Superior Court, in the present matter, fully acknowledged the propriety of the precedent which has sprung from *Buell* and its progeny. Applying this federal law, the court recognized that plaintiff was allegedly harmed emotionally while engaged in his regular employment as a barge captain. He was never personally threatened in his job by the irrational seaman, Edwards, nor was he a witness to any serious physical injury to someone else. (A.35a-36a). Of course, plaintiff never sustained any physical injury or even physical contact. Under these circumstances, the state appellate court found:

> . . . that there can be no recovery under the Jones Act for the psychological and physical manifestations of job related stress alleged by the plaintiff - appellant. (A.36a)

The appellate court, like the many courts which have considered the issue, acted properly and in accordance with this Court's guidelines in *Buell.* Since no conflict exists with that decision, this does not constitute a "special and important" reason for the granting of a writ of certiorari.

(2) Certiorari is not warranted since the question does not constitute an important question of federal law which has been decided in conflict with competent legal precedent.

The overwhelming precedent recognizes that there should be no recovery for purely emotional injury to a seaman. The recognition of this precedent has not been developed without rational and sound basis. The Fifth Circuit Court of Appeals, in denying a seaman's psychological claim in *Gaston v. Flowers Transp.,* outlined many of the legitimate reasons which weigh in favor of denying recovery. The court justified this denial, in part, based on the fact that seamen and FELA employees voluntarily select professions in which certain hazards are inherent. Payment of compensation for emotional injuries arising from such acknowledged, traditional, and accepted hazards would be illogical and inappropriate:

> [T]here seems to be something incongruous in undertaking such an extension of liability to seamen and railroaders. *These have knowingly and voluntarily chosen callings which, while today perhaps not fairly termed dangerous, yet do involve braving certain hazards and are traditionally not well suited to the squeamish or fainthearted.* To undertake to enlarge such persons in damages in proportion to the delicacy of their emotional reactions seems a curious policy. (emphasis supplied) 866 F.2d at 820.

The *Gaston* court was also quite concerned about opening a Pandora's box of vessel owner liability which historically has been closed. The traditional common law has always denied liability for emotional injuries without physical impact or at least threat of physical impact and injury. See e.g. W. Page Keeton et al., *Prosser and Keaton on The Law of Torts,* §54 (5th ed. 1984). This provided a means to prevent recovery for fraudulent claims of psychological harm. Restatement (Second) of Torts §436A (1965). The *Gaston* court adopted this established authority, stating, as to the Jones Act and the FELA, that to construe:

> . . . these federal workers' compensation acts to cover bystanders' injuries would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages. 866 F.2d at 819.

The court concluded that "permitting such a recovery, not for such injuries resulting from physical trauma to the plaintiff, or even from his fear of such trauma to himself, but for emotional injury stemming from witnessing a bad sight" would improperly expand the bounds of recovery. *Id.* In fact, the courts have generally not done so; and the *Gaston* panel noted that the reason why is clear. To allow such relief would create "random and wayward" actions with potentially disastrous financial ramifications for employers. *Id.* at 820.

In the footnote following this text, the court commented on the extraordinary detriment of allowing such "random and wayward" recoveries. The court alluded to the practical non-insurability of protecting railroad and shipping companies from such nebulous claims; the prohibitive costs in recognizing such liability which would threaten the very existence of some of these businesses; the number of jobs which would be lost; the difficulty in determining the true psychological effect of

witnessing a single traumatic event; and the potential for many bogus injuries and fraudulent claims. 866 F.2d at 820, n.3.

The very concerns voiced by the *Gaston* panel and courts like it, including the Pennsylvania appellate court herein, are present in this case. There is a serious question as to whether the injuries of plaintiff, Klineburger, legitimately can be traced to a two day incident involving one seaman, in the face of plaintiff's eventful and "stress filled" sixteen year seagoing career. Allowing an avenue of recovery for emotional claims in this situation would result in obvious causation problems and questions concerning the veracity of the claim itself.

The issue of whether a seamen should recover for purely emotional damages is an important federal question; but it is one which already has been determined correctly by nearly every court which has considered the question. *Buell* permitted the courts the freedom to develop the law, and they have done so, for the most part, properly and in accordance with the dictates of this Court. That the development of the law has proceeded in satisfaction of the Supreme Court mandate is evidenced by the two recent denials of petitions for writs of certiorari on the issue, *Ray v. Consolidated Rail Corp.*, and *Carroll v. Consolidated Rail Corp.;* the vast supporting precedent from the courts around the country; and the Pennsylvania Supreme Court's determination in this matter that it was unnecessary to hear the issue.

Faced with this overwhelming weight of legitimate, well-reasoned authority, plaintiff is left only with the questionable decision in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir. 1991), court en banc argument ordered February 11, 1992, 954 F.2d 266 (5th Cir. 1992) and the reluctant Ninth Circuit precedent embodied by *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309 (9th Cir. 1986), to support his petition that this is a federal question worthy of consideration by the Court.

It is acknowledged that *Plaisance* and *Taylor* technically represent a split in authority with the Pennsylvania Superior Court in this matter and the five federal Circuit Courts of Appeal which have addressed the issue. However, while the body of precedent which bodes against recovery for purely emotional harm is vast, well-developed, and confident in its position, both the *Plaisance* and the *Taylor* opinions are vulnerable and internally defective. As a result, their value in support of whether the question should be considered is minimal at best.

Plaisance does not represent adequate authority to justify certiorari for several reasons:

(1) The opinion of the panel in *Plaisance* is presently under scrutiny. The matter is scheduled to be argued before the Fifth Circuit Court of Appeals on a rehearing en banc, during the week of May 11, 1992. The granting of a rehearing en banc has the effect of vacating the original panel's opinion and judgment and staying the mandate. 5th Cir. R.41.3. Thus the opinion in *Plaisance* is, at this time, not controlling legal precedent.

(2) *Plaisance* is not a bystander liability case – as is *Gaston v. Flowers Transp.,* 866 F.2d 816 (5th Cir. 1989). Even the *Plaisance* court acknowledged that *Gaston* is still the law in that jurisdiction, with regard to bystander liability. Klineburger, plaintiff herein, is clearly a bystander to the factual events which form the basis for his cause of action. He was, at all relevant times, merely a witness, never himself endangered or threatened. The contention in plaintiff's petition that he was not a bystander; but that he was a "participant," is a transparent attempt to distinguish the well-reasoned holding in *Gaston.* It is an exercise in semantics and, simply put, offers a mischaracterization of the factual circumstances.

(3) Although the *Plaisance* court recognized that, in theory, a claim for emotional injuries under the Jones Act may exist, finding a situation which permits such a recovery may be difficult. In fact, the plaintiff, Plaisance, was himself denied recovery by the appellate panel. *Plaisance* was a vessel captain responding to and involved in a serious marine explosion and fire. During that time he had a perception that he and others could be killed. However, the court, citing *Gaston,* acknowledged "that seamen and railroaders have chosen callings that 'involve braving certain hazards [which] are traditionally not well suited to the squeamish or faint hearted.'" 937 F.2d at 1011. With this as a basis, the Fifth Circuit affirmed the lower court's dismissal of plaintiff's emotional injury claim. Klineburger, plaintiff herein, was only a bystander to events. Unlike *Plaisance,* he never even believed he was threatened or in any danger. Even under the liberal standard suggested by *Plaisance,* there can be no liability here for alleged emotional damages.

(4) The strong dissent in *Plaisance* makes several salient points. Among them is that the majority opinion is dangerously bucking the overwhelming weight of authority that carefully avoids allowing recovery for emotional injuries without attendant physical harm. This authority is well established and "partly designed to prevent feigned claims of emotional injury." 937 F.2d at 1012. The dissent confirms the validity and viability of *Gaston* and its rationale; and recognizes the impracticability and difficulty of actually applying the majority's "full recovery rule," which effectively condones suspect claims with "their proneness to triviality or falsity." *Id.* at 1013.

The other jurisdiction which has failed to confirm the impropriety of recovery by seamen/railroaders for emotional injury is the Ninth Circuit. Nevertheless, the

last pronouncement by the Court of Appeals in the circuit is, by the court's own admission, suspect. In *Taylor v. Burlington Northern R.R. Co.,* the appellate panel was compelled to follow its prior ruling in *Buell v. Atchison, Topeka & Santa Fe Ry,,* 771 F.2d 1320 (9th Cir. 1985), which had allowed recovery for emotional damage.[5] However, the court was clearly disturbed in allowing such a recovery in the face of conflicting, better reasoned results in other jurisdictions: ". . . despite our reservations, we are bound by *Buell.*" 787 F.2d at 1313. Nonetheless, solace was taken in this case, since the plaintiff might indeed have sustained physical injury. The court rationalized that: "Even, if *Buell* were not binding, however, it is not clear from the record before us that appellant presents no evidence of a physical touching or injury." *Id.* Thus the court was satisfied that it had reached the right result – even though it was for the wrong reason.

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5. The *Taylor* opinion was issued prior to this Court's review of the Ninth Circuit's *Buell* decision.

CONCLUSION

The Pennsylvania Superior Court correctly applied the prevailing and almost universally accepted law in denying recovery to a seaman who allegedly suffered purely emotional injury. The court's ruling is not in conflict with a decision of the United States Supreme Court nor does it present an important federal question which warrants this Court's consideration. There being no special and important reasons for this Court to review the holding of the Pennsylvania Superior Court, the petition of plaintiff for writ of certiorari should be denied.

Respectfully submitted,

STUART M. GOLDSTEIN
Counsel of Record for Respondents
CLARK, LADNER, FORTENBAUGH
& YOUNG
One Commerce Square
2005 Market Street
22nd Floor
Philadelphia, PA 19103
Attorneys for Respondents